Nos. 21,982 and 21,982-A

United States Court of Appeals

For the Ninth Circuit

T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING, et al., *Appellants,* vs. UNITED STATES OF AMERICA, ex rel. JOHN P. RINEER, d/b/a RINEER OIL SURFACING, *Appellee.*	No. 21,982
T. STANFORD GOODMAN, d/b/a LINDO ENGINEERING, et al., *Appellants,* vs. UNITED STATES OF AMERICA, ex rel. TURLOCK ROCK COMPANY, *Appellee.*	No. 21,982-A

Appeal from the United States District Court for the Eastern District of California

BRIEF OF APPELLEE TURLOCK ROCK COMPANY

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Subject Index

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This brief is on behalf of Turlock Rock Company and in answer to the opening brief of T. Stanford Goodman, d/b/a Lindo Engineering, et al.

QUESTIONS INVOLVED

The appellant raises only two factual matters against the appellee Turlock Rock Company, both of which appear on page 19 of appellant's opening brief. Appellant contends:

1. When Rineer rejected the $1.30 per ton sand, Turlock Rock Company should have informed Goodman of the change.

2. Since the $1.50 sand was harder to handle than the $1.30 sand, Turlock Rock Company should be assessed with the additional costs incurred by Goodman.

ARGUMENT

1. THE FINDINGS OF THE DISTRICT COURT ON THE TWO QUESTIONS PRESENTED BY APPELLANT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The lower Court found

> "That Turlock Rock Company did not agree to provide sand without moisture and both said prime contractor and sub-contractor continued to pick up the sand at the Turlock Rock Company plant knowing it to be wet." (From Findings, C. T. 119, lines 8-11.)

Originally the parties had been talking with Turlock Rock Company about sand which was understood to be "concrete sand." Goodman always contended that "concrete sand" was suitable for the job, but the final order was for "plaster sand." Turlock Rock Company did not have a stockpile of this and had to

start making it. Since the sand was taken immediately from the river, there was moisture in it and both Rineer and Goodman were warned that there would be a moisture problem.

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2. TURLOCK ROCK COMPANY WAS NOT OBLIGATED TO MEET CONTRACT SPECIFICATIONS—IT ONLY FURNISHED WHAT THE CONTRACTORS SELECTED.

The cross-complaint by Goodman against Turlock Rock Co. in paragraph V (C. T. 21) alleges that "cross-defendants had specially prepared the sand according to specifications provided by the Air Force."

The only problem was in the moisture which resulted in some spreading difficulty. The moisture problem was known to both Rineer and Goodman before the job started. (R. T. 83, 84, 217 and 218.)

Goodman was at the job when it started and knew what the problem was and knew what sand was being used. (R. T. 261, 262.) Despite this, he continued using the same sand when he took over the job. (R. T. 273, lines 9 to 16.)

It is thus unimportant whether Rineer or Goodman was responsible for selection of the sand, because both used it.

Goodman did not have to continue using the wet sand when he took over the job (R. T. 275, lines 8 to 13)—he was free to change to dry sand—but, knowing all the problems, he continued to order and pick up the wet sand from Turlock Rock Company.

There was no contract between Goodman or Rineer and Turlock Rock Company whereby Goodman had ordered a specific amount of sand or was obligated to take any particular sand or to take any sand at all. Turlock Rock Company was simply in the position of a merchant. It had sand or could make sand, and there were established prices for the various kinds of sand.

Turlock Rock Company did not deliver the sand, but it was simply picked up by the party using it. Both Rineer and Goodman could have quit taking sand at any time.

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3. GOODMAN HAS ADMITTED OWING TURLOCK ROCK COMPANY, AND HAS MADE PARTIAL PAYMENTS.

The sand was only part of the material furnished by Turlock Rock Company. Exhibit No. 6 shows that 10,496.55 tons of base rock was furnished. The amount and price for this are not in dispute. This exhibit also shows that 2721.45 tons of sand was furnished. There is no dispute about the amount of the sand.

There was also equipment rental of $462.00, and an interest charge of $47.60. No charge was made for use of scoop to air out the sand. (R. T. 221.)

The total amount owing for all of these items to Turlock Rock Company is $17,130.88.

Goodman had paid $10,106.20 plus $427.00 or a total of $10,533.20, leaving an unpaid amount of $6597.68 bearing interest from November 5, 1965. (R. T. 142 to 147.)

Exhibit No. 9, a letter from Goodman dated March 9, 1966, says in part "legally I am responsible for the payment anyway. I am sorry that Turlock Rock Company is involved in this dispute between Rineer Co. and myself." This letter enclosed a check for $427.00 as interest (but which was applied to principal).

On August 27, 1965, Goodman sent a cashier's check for $848.64 payable to Turlock Rock Company and Rineer Oil Co. (Exhibit 10.) Rineer Oil Co., or its counsel, apparently still has possession of this check.

Further, about December 24, 1965, Goodman sent a check to Turlock Rock Company for $4582.23 (Exhibit 12), but the endorsement on the check made it unacceptable because it did not clear the account.

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4. THE PARTIES KNEW THE PRICE OF PLASTER SAND WAS $1.50 A TON.

Turlock Rock Company quoted to Goodman a price of $1.30 for concrete sand and $1.50 for plaster sand. (R. T. 215, lines 20 to 25.)

Rineer testified that he had gotten the price of $1.50 per ton from Turlock Rock Company and that he informed Goodman of this price. (R. T. 160, lines 10 to 15.)

Goodman knew that the price was $1.50 a ton. (R. T. 185, lines 18 to 21.) In R. T. 200, lines 17 to 25, Goodman testified:

"Further, I would like to draw your attention to the exhibit and the words, 'any reduction in the sand price will reduce Rineer Oil's contract by an equal amount'; what did you understand that to mean?

A. I understand that to have meant that if Turlock Rock—excuse me, that if Rineer Oil was to have to pay $1.50, I was responsible for the 20 cents difference, so by the same virtue, if the thing was reduced through some reason, I wanted the advantage of it."

Also at page 259, lines 15 to 19, Goodman said:

"In other words, I felt that he and I were stipulating to the price of $1.30. If the rate changed I would get the advantage of the lower price and protect him from the disadvantage of having a higher price."

Goodman's testimony at R. T. 183, lines 11 to 15, substantiated Mr. Frank's testimony that the $1.30 price applied only to "concrete sand".

"I'm not altogether certain but what the $1.30 sand would have worked. I never changed the source.

Q. Well, it wasn't to specification was it?

A. I have no proof that it wasn't. No one asked us to resubmit."

In Goodman's letter (Exhibit 10) he stated a price of $1.50 a ton.

CONCLUSION

Turlock Rock Company, as far as it was concerned, had its dealings with Goodman, he originally ordered the materials, the United States paid *him* for the job and materials, and he is the one who is obligated to pay for the materials. He was not obligated to take the materials, but he did and he has refused to pay a part of the balance owing, though he has admitted an obligation.

It is respectfully submitted that judgment in favor of Turlock Rock Company should be affirmed.

Dated, Turlock, California,
December 11, 1967.

Respectfully submitted,
GILBERT MOODY,
H. E. GLEASON,
By GILBERT MOODY,
Attorneys for Appellee
Turlock Rock Company.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GILBERT MOODY,
Attorney for Appellee
Turlock Rock Company.